

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Communications Assistance for Law Enforcement |) | ET Docket No. 04-295 |
| Act and Broadband Access and Services |) | |
| Administration |) | RM-10865 |
| _____ |) | |

**REPLY COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (“USTA”),¹ submits its reply comments through the undersigned and pursuant to the Federal Communications Commission’s (“FCC’s or Commission’s”) Communications Assistance for Law Enforcement Act (“CALEA”)² Notice of Proposed Rulemaking (“NPRM”).³ The NPRM stems from issues presented in the Joint Petition for Expedited Rulemaking of the Federal Bureau of Investigation, U.S. Department of Justice, and U.S. Drug Enforcement Administration (collectively, “Law Enforcement”).

INTRODUCTION & SUMMARY

USTA files these reply comments because of the critical role that incumbent local exchange carriers (“ILECs”) play in providing Law Enforcement with the ability to intercept court authorized electronic surveillance. USTA member companies are committed to working with Law Enforcement to investigate crime and protect the United States from incidents of

¹ USTA is the Nation’s oldest trade organization for the local exchange carrier industry. USTA’s carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as 47 U.S. §§ 1001-10 and 47 U.S.C. § 229).

³ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Ruling*, ET Docket No. 04-295, RM-10865 (Aug. 9, 2004) (NPRM).

terrorism. However, Law Enforcement's electronic surveillance requirements and capabilities must be consistent with the CALEA and its legislative history.

USTA believes that many of the Commission's tentative conclusions contradict CALEA and the intent of Congress. The Commission must ensure that imposed CALEA requirements are legally sustainable.⁴ Imposing further CALEA obligations that will not survive judicial review will fail to serve the best interests of Law Enforcement and the communications industry. Thus, the Commission must be "certain that its legal analysis is sufficiently rigorous to survive the judicial review that inevitably follows major Commission rulemaking proceedings."⁵

Voice over Internet Protocol ("VoIP") providers fall within the scope of CALEA and must adhere to the capabilities and requirements. If the Commission determines that broadband access falls under CALEA, the Commission must apply CALEA obligations equally to all competing providers. In addition, broadband access providers should not be considered by Law Enforcement as "one stop shopping" for electronic surveillance. CALEA's obligations should also apply to the application provider that controls the service, functionality, facility and the network equipment to meet Law Enforcement's needs. USTA believes that Law Enforcement should principally rely on the application provider to perform its electronic surveillance needs.

The Commission's CALEA 90-day packet-mode deadline is unreasonable because there is industry uncertainty as to the definition of call-identifying information. Until a definition is agreed upon, the industry cannot create a standard that manufacturers can build too. In addition, CALEA implementation costs should not be borne exclusively by carriers and consumers. Finally, the Commission should allow, but not require, trusted third parties ("TTP") to provide the CALEA functionality.

⁴ SBC Communications Inc at 7 (SBC).

⁵ *Id.*

DISCUSSION

VoIP Service Providers Should Be Subject To CALEA; Application Of CALEA Requirements To Broadband Access Services Should Be Made In A Competitively Neutral Manner.

USTA agrees with the Commission that VoIP providers fall within the scope of CALEA. Such a finding is consistent with CALEA's definition of "telecommunications carrier," which is more expansive than the definition of the term in the Communications Act of 1934, as amended. VoIP providers satisfy the CALEA definitional requirements as being a substantial replacement to the circuit switched telephone network. In addition, providers of VoIP services have a social obligation to ensure public safety and national security. Thus, the public interest requires that VoIP providers be subject to CALEA.

As for broadband access service providers, the Commission must determine that CALEA obligations are imposed equally on all competing providers. The Commission has already determined that digital subscriber line ("DSL") is subject to CALEA. "All service providers, regardless of the platform they use to deliver services (i.e. cable, DSL, wireless, satellite, powerline), should be subject to the same CALEA obligations."⁶ The Commission would competitively disadvantage DSL providers by not requiring all service providers to be CALEA compliant. "Providers such as Verizon would incur costs to comply with CALEA, and necessarily pass such costs to its customers, while its competitors deploying cable modem and other broadband services would incur no such costs."⁷ Whatever conclusion the Commission may reach it should not, however, unfairly advantage one technology or application provider over another and the Commission must specifically tailor the CALEA obligation to fit offered broadband applications.

Finally, USTA member companies will not always have the ability to provide Law Enforcement with the information that it needs, so CALEA must apply evenly to the service

⁶ *Id.*

providers it was specifically designed to cover. The purpose behind CALEA was not “one-stop shopping” for law enforcement.⁸ CALEA’s legislative history supports the proposition that a provider’s obligations must reflect what is under the provider’s control. “The question of which communications are in a carrier’s control will depend on the design of the service or feature at issue, which this legislation does not purport to dictate.”⁹ A division of responsibility is consistent with the intent of Congress that “carriers are required to provide data carried in a digital form to law enforcement in that form, while it is law enforcement’s responsibility to determine if the communication is ‘voice, fax, or data and [to] translat[e] it into usable form.’”¹⁰ For example, Verizon points out that it does not have the ability to interpret information above layer 2 where it provides wholesale broadband access service; in such situations, law enforcement would have to determine who the wholesale customer is, and go to that customer to interpret information above layer 2.¹¹ “Even where Verizon provides retail broadband access service, it normally does not process or interpret information above layer 3 of the protocol stack for applications that it does not provide to the individual customer, and thus cannot assist law enforcement in translating data to a usable form.”¹² Thus, law enforcement may also have to go to the application service provider to obtain useable information, and any CALEA requirements must be tailored to reflect these constraints.

The Commission Should Not Arbitrarily Set A 90-Day Deadline For CALEA Compliance.

The Commission’s proposed 90-day period to comply or seek relief from CALEA requirements is “flatly unreasonable – all the more so, given the Commissions suggestion that

⁷ Verizon at 10-11.

⁸ House Judiciary Comm., Communications Assistance for Law Enforcement Act of 1994, H.R. Rep. 103-827(I) at 3500 (1994) (summary and purpose) *reprinted in* 1994 U.S.C.C.A.N. 3487.

⁹ *Id.* 3502.

¹⁰ *Id.* at 3402.

¹¹ Verizon at 12.

¹² *Id.*

extensions of the ninety-day period will be extremely difficult for carriers to obtain.”¹³ It is not “reasonably achievable” today for packet-mode services to be CALEA compliant and “almost certainly will not be within 90 days after the Commission issues its order in this proceeding (the deadline the Commission proposes).”¹⁴ The exact amount of time for carriers to become CALEA compliant depends on the “scope of CALEA’s capability requirements with respect to broadband access services and what the requirements mean when applied to such services.”

Currently, there is uncertainty within the industry in regards to the meaning of call-identifying information in the context of packet-mode services. To alleviate the uncertainty, the Commission should quickly establish forums and workshops to discuss CALEA capabilities, limitations, and responsibilities.¹⁵ Following the results of the industry forums and workshops, the Commission must allow a reasonable amount of time for standards to be developed for these services.¹⁶ Until a standard which is compatible with the appropriate technologies and facilities of carrier networks has been developed and agreed upon by the industry, the Commission should not set deadlines for compliance. In the meantime, there are other means today by which Law Enforcement can acquire electronic surveillance on advanced technologies other than CALEA.¹⁷

¹³ See SBC at 23 (citing the NPRM at §§ 97 & 99).

¹⁴ Verizon at 14.

¹⁵ SBC at 23.

¹⁶ *Id.*

¹⁷ CALEA does not eliminate long-standing electronic surveillance laws, but is intended to supplement the general wiretap laws (*e.g.*, the Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Electronic Communications Privacy Act of 1986; the pen register and trap and trace device statute). The purpose behind the Electronic Communications Privacy Act of 1986 (“ECPA”) was to “update and clarify federal privacy protections and standards in light of the dramatic changes in new computer and telecommunications technologies.”¹⁷ Currently, Law Enforcement is using its authority under ECPA to conduct authorized electronic surveillance on Internet service providers.

CALEA Costs Should Not Be The Sole Burden Of Carriers Or End-User Customers, As These Costs Should Also Be Directly Recoverable From Law Enforcement.

The enormous costs associated with CALEA compliance must not be the sole burden of the carrier or its end-user customers.¹⁸ Since Law Enforcement is a customer, carriers should also recover their costs from the cost causer-Law Enforcement. According to Title III of the Omnibus Crime and Safe Streets Act (“Title III”) a “provider of wire or electronic communication service, landlord, or custodian or other person furnishing such facilities or technical assistance shall be compensated therefore by the applicant for reasonable expenses incurred in providing such facilities or assistance.”¹⁹ Clearly, Law Enforcement must pay carriers the costs of providing facilities and performing electronic surveillance activities. The Commission has also permitted carriers to recover the costs of their CALEA software and hardware by charging Law Enforcement for each electronic surveillance order authorized by CALEA.²⁰ The fee that carriers recover may include capital costs, “as well as recovery of the specific costs associated with each order.”²¹

The Commission and Title III are consistent that providers of electronic surveillance should charge Law Enforcement the costs incurred in providing facilities for intercepts.²² Carriers that are subject to CALEA compliance should be permitted to recover their costs for

¹⁸ Covered providers should be given the option to pass on to subscribers costs associated with CALEA compliance. Section 229 of the Act permits the Commission to authorize carriers to adjust their charges to recover CALEA related costs for meeting the assistance capability requirements under section 103 of CALEA. The Commission has also recognized that “to the extent that there are costs borne by carriers and passed through to customers . . . it is likely that the costs would be shared by all ratepayers, and therefore, would be significantly diluted on an individual residential ratepayer basis.” See Order on Remand, *Communications Assistance for Law Enforcement Act*, 17 FCC Rcd 6896, 6911 ¶ 47 (2002) (Order on Remand).

¹⁹ See SBC at 26 (citing 18 U.S.C. § 2518).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

post-1995 equipment from Law Enforcement. Thus, consistent with Commission precedent and Title III, the Commission should allow reimbursement of post-1995 CALEA implementation costs from Law Enforcement.

The Use Of A Trusted Third Party Should Be An Option, Not A Requirement.

The Commission should consider TTP as a viable, but not required, option for carriers to provide the CALEA functionality. Essentially, a TTP manages the intercept process for the telecommunications carrier. The TTP provides the CALEA section 103 capabilities on behalf of the carrier to Law Enforcement.

The use of TTPs may be a cost effective solution for those carriers that do few, if any, electronic intercepts. According to Law Enforcement, “third parties might be helpful to certain carriers, such as small or rural entities, that lack the in-house expertise to comply on their own.”²³ The Commission, however, must be mindful that TTPs should not be considered a “one size fits all” solution for providing call-identifying information for the entire industry.²⁴ Carriers should be left to determine the means in which they provide Law Enforcement with content and call-identifying information. “Indeed, CALEA forbids the Commission from requiring carriers to adopt any particular network design.”²⁵

Further, TTPs “should not be owned, governed, or controlled by Law Enforcement.”²⁶ TTPs must be independently owned and impartial without ties to the government in order to avoid potential conflicts of interest or perceptions of impropriety.²⁷ The information that TTPs will acquire from ILEC networks will be sensitive in nature and must protect United States citizens 5th Amendment privacy rights.

²³ See Comments of the United States Department of Justice at 49.

²⁴ SBC at 23-24.

²⁵ *Id.* at 24.

²⁶ BellSouth Corporation at 44.

²⁷ *Id.*

Finally, the TTP should not be seen as a vehicle to shift CALEA costs to the telecommunications industry.²⁸ Currently, Law Enforcement is compensating TTPs for their intercept costs associated from court authorized electronic surveillance.²⁹ This approach should not be disturbed by the Commission.

CONCLUSION

For the foregoing reasons, USTA urges the Commission to require VoIP providers to be CALEA compliant. Should the Commission find that broadband access services are subject to CALEA, those obligations must apply equally to all broadband access service providers. The Commission's proposed 90-day implementation timeline for packet-mode services is clearly unreasonable. Finally, CALEA issues involving cost recovery and TTP should be resolved consistent with the comments provided herein.

Respectfully submitted,

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²⁸ *Id.*

²⁹ *Id.*